

BOARD OF COUNTY COMMISSIONERS

AGENDA ITEM SUMMARY

Meeting Date: May 19, 2004

Division: Growth Management

Bulk Item: Yes ☐ No ☒

Department: N/A

AGENDA ITEM WORDING: Approval of a request by Industrial Communications and Electronics to authorize legal counsel to enter into a stipulated agreement staying the pending appeal order by the 11th Circuit Court of Appeals until the Board of County Commissioners has had an opportunity to hear a proposed settlement agreement at an appropriate time and venue.

ITEM BACKGROUND: As reported to the BOCC by the County's Growth Management Litigation Attorney, Industrial Communications and Electronics (ICE) involves a proposed 1,000 foot communications tower on Cudjoe Key. This federal case alleges that the wireless tower moratoria enacted by the County were unconstitutional on various grounds and violated the Federal Communications Act.

ICE's attorney submitted a letter to the Growth Management Division suggesting a proposed settlement agreement, which is attached to this agenda item. Due to the significant public policy issues involved, the County Growth Management Director and Division's Litigation Counsel recommend that this settlement agreement be discussed in the Sunshine and scheduled as a Commission agenda item in a proper venue, such as in the Middle or Lower Keys.

As the 11th Circuit Court of Appeals is already deliberating on this case, ICE is requesting that both parties enter into a stipulated agreement staying the pending appeal order to be issued by that court until the Board of County Commissioners has the opportunity to discuss the proposed settlement agreement.

PREVIOUS RELEVANT BOCC ACTION: Board discussed settlement of this appeal in Executive Session in 2003.

CONTRACT/AGREEMENT CHANGES: N/A

STAFF RECOMMENDATIONS: Approval

TOTAL COST: N/A

BUDGETED: Yes ☐ No ☐

COST TO COUNTY: N/A

SOURCE OF FUNDS: _____

REVENUE PRODUCING: Yes N/A No ☐ **AMOUNT PER MONTH** _____ **Year** _____

APPROVED BY: County Atty ☐ OMB/Purchasing ☐ Risk Management ☐

DIVISION DIRECTOR APPROVAL: _____


Timothy J. McGarry, AICP

DOCUMENTATION: Included ☒ To Follow ☐ Not Required ☐

DISPOSITION: _____

AGENDA ITEM # 3

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April 14, 2004

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Tim McGarry, Director
Growth Management Division
Monroe County
Marathon, Florida

Re: Industrial Communications v. Monroe County
Appeal #03-12233-DD

The subject of settlement of this appeal has been before the Commission in "Executive Session".

Industrial Communications & Electronics (ICE) bought the 62-acre Cudjoe borrow pit based upon advice (written) from Monroe County Senior Comprehensive Planner, Chad Meadows. ICE worked for 2 years to help Monroe County originate and pass a Tower Ordinance (#028-1999 approved by DCA 9/14/99). The ordinance had no height limitations. Three (3) moratoriums later, an "Amended Tower Ordinance" was passed prohibiting any tower from being constructed in excess of 300 feet. After the second moratorium, ICE filed suit in the State Court contesting the procedure used by Monroe County in passing the second moratorium. The County prevailed by explaining to the Court that the moratorium was "only" 180 days and was necessary in order to change Monroe County's Comprehensive Plan. Upon expiration of the 180 second moratorium, a third moratorium was entered and, to date, no change in Monroe County's Comprehensive Plan has been made relating to communication towers.

Monroe County asked for and received from ICE/DCA (on 11/9/99) a so-called "380 Agreement" allowing placement of one of the tower anchors in wetlands. On January 20, 2000, Monroe County requested and received a "Permanent Conservation Easement" closing the Cudjoe borrow pit and requiring a considerable amount of wetlands restoration work. This Conservation Easement insures that the easement only

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allows the construction of the tower and building housing a communications booth, large diesel generators, etc.. The rest of the property is required to remain in its natural and/or restored state. Monroe County also requested and received a "Co-Location Agreement" requiring ICE to allow the placement of private and public antenna structures on the ICE tower. Sheriff Roth has written the County in support of the ICE tower due to its ability to cover all of Monroe County from one transmitting antenna.

Monroe County staff decided to process the ICE tower application under the Amended Tower Ordinance and ICE filed in Federal Court to require processing under the ordinance that was in effect at the time the ICE tower application was filed. The Court held that the prior State Court action prohibited the federal action. ICE took an appeal, which remains pending.

Recently, the USCG was funded (under Homeland Security provisions) for a national project called "Rescue 21". This involves placement of towers around the U.S. coastline to instantly triangulate radio transmissions. The contractor for the USCG is General Dynamics (Mr. Mark Fitzgerald (480) 441-3559 of Phoenix, AZ).

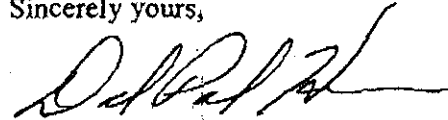
If the Industrial Communications tower is permitted and built, then this one tower will be used instead of towers being constructed for the USCG on federal lands along the Keys, without the need - or opportunity - for input from Monroe County. Attached are the drawings for the proposed 1500 ft. tower at Saddlebunch Key (MM-15). The "Rescue 21" plan also includes a tower in Islamorada (at MM-79). Federal towers do not allow co-location and the Permanent Conservation Easement previously conveyed to Monroe County will have to be rescinded and continued operation of the borrow pit will have to be allowed. There will be no wetlands restoration.

Finally, settling the Federal Court appeal with Industrial Communications will not create any dangerous/future precedent that can be used against Monroe County. The Cudjoe site is the only place in Monroe County where a tall civilian tower can be constructed. The legal justification for settlement is that our permit would be issued under the original tower ordinance that was in effect when the Industrial Communications application for the tower permit was submitted.

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This settlement helps Homeland Security and is supported by Sheriff Roth, the INS, DEA and USCG, it allows future co-location of antennas and it settles litigation with Monroe County.

Sincerely yours,



DAVID PAUL HORAN
For the Firm

DPH:krh

Attachments as stated.

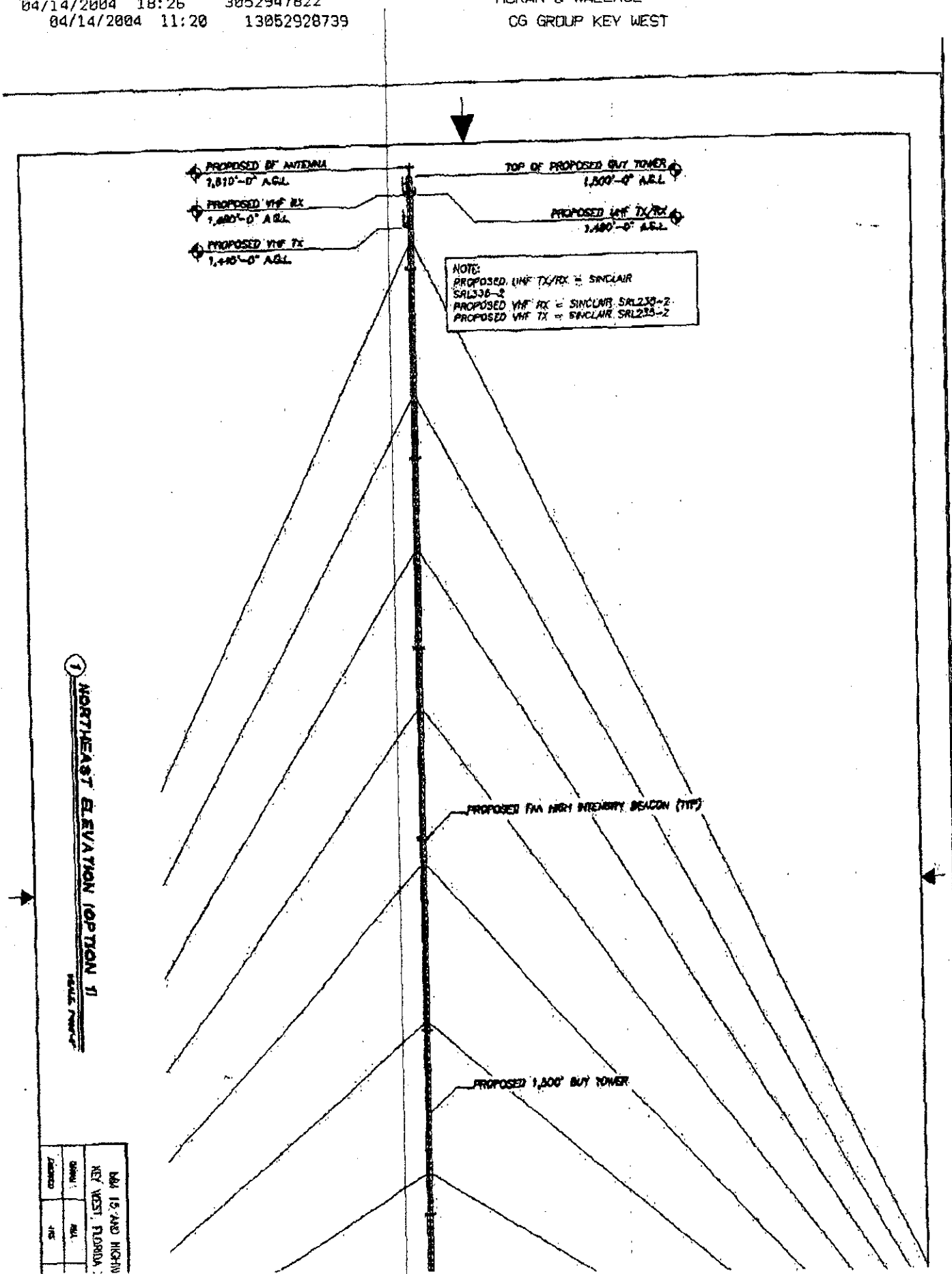




Figure 5-52. Saddlebunch Site Title Sheet, Vicinity Map, and General Information